

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BILL F. GILLUM)	
Claimant)	
VS.)	
)	
TEXACO REFINING & MARKETING)	Docket Nos. 223,962
Respondent)	& 225,494
AND)	
)	
CIGNA WORKERS COMPENSATION)	
Insurance Carrier)	

ORDER

Claimant appeals from the Award of Administrative Law Judge John D. Clark dated July 21, 1998, wherein the Administrative Law Judge found claimant to have suffered two scheduled injuries, awarding claimant a functional impairment to the right upper extremity, and denying claimant benefits beyond medical treatment to the left upper extremity based upon K.S.A. 1992 Supp. 44-501(c), as interpreted by Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996). Oral argument was held on February 12, 1999, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's injury and/or disability? And more particularly, is the claimant entitled to two scheduled injuries or a general body injury resulting from the series of traumas experienced while employed with respondent? In addition, should claimant be limited to his medical treatment for the injury of September 18, 1992, to the left upper extremity, for having failed to meet the criteria set forth in K.S.A. 1992 Supp. 44-501(c) as interpreted by Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

DOCKET NOS. 223,962 & 225,494

Claimant began working for respondent on August 30, 1970, as a laborer. Claimant continued in respondent's employment for some 27 years. For the last 8 years, claimant worked in maintenance, as an operator. On September 18, 1992, claimant suffered an injury to his left wrist while taking a door off the bottom of a furnace. While breaking loose some bolts, the door came down on claimant, pulling and twisting his left wrist. Claimant advised respondent of the injury and was referred for medical treatment. Claimant first saw Dr. Phillip Olsen in El Dorado, Kansas, but later was referred to Dr. J. Mark Melhorn, a board certified orthopedic surgeon in Wichita, Kansas. Dr. Melhorn first saw claimant on November 9, 1992. Dr. Melhorn provided conservative treatment, including heat and cold therapy, and recommended a modification of claimant's activities. He referred claimant for additional testing, which led to a diagnosis of left carpal tunnel syndrome. Dr. Melhorn recommended surgery, but claimant was reluctant and ultimately refused the surgery. Dr. Melhorn, in his December 21, 1992, letter to Dr. Olsen, acknowledged claimant's reluctance to undergo the surgery, and further indicated that claimant was returned to work in a "restricted work environment." Dr. Melhorn assessed claimant an 11.95 percent impairment to the left upper extremity at the forearm level. He did not again see claimant until August 18, 1997, after claimant suffered a second injury with respondent.

Claimant, however, continued treatment with Dr. George Lucas, a board certified orthopedic surgeon, beginning July 1, 1994, and continuing through July 8, 1997. Dr. Lucas diagnosed claimant with a strain of the intermetacarpal ligament, between the fourth and fifth rays, which he treated conservatively, including injections with steroids. Claimant's complaints were limited to his left upper extremity through the vast majority of his treatment with Dr. Lucas. However, on February 6, 1997, claimant suffered an additional injury to his right upper extremity, including his shoulder. After that, Dr. Lucas noted claimant had complaints to his hands, plural, with an indication that claimant's hands were "clumsy." Dr. Lucas last saw claimant on July 8, 1997, at which time claimant was

still complaining of symptoms bilaterally. However, Dr. Lucas did not diagnose him with bilateral carpal tunnel syndrome. Claimant's carpal tunnel syndrome was limited to the left side only.

After the February 1997 injury, claimant came under the care and treatment of Dr. Harry A. Morris, a board certified orthopedic surgeon who specializes in upper extremity, hand and microvascular surgeries. Dr. Morris first saw claimant on May 5, 1997, at which time claimant had complaints of right shoulder pain. He described an injury in February 1997 when, after using a sledgehammer for part of the day, claimant had a sore right shoulder and was unable to lift it. Dr. Morris's physical examination revealed a positive impingement sign, which is indicative of a compression through the shoulder. Claimant also had weakness in his rotator cuff tendon, which Dr. Morris considered to be a major finding. Dr. Morris diagnosed impingement syndrome and probability of a rotator cuff tear. He recommended claimant undergo an MRI scan of the shoulder, which was consistent with the rotator cuff tear.

Dr. Morris discussed claimant's options, including conservative treatment versus surgery. Claimant elected to have surgery to the right shoulder, which was performed on June 10, 1997. At that time acromial spurring was removed and a moderate-sized rotator cuff tear was repaired. Dr. Morris continued with post-surgery treatment. However, on July 21, 1997, claimant met with Dr. Morris in his office for what was to be a consultation. At that time, Dr. Morris discovered claimant was hiding a tape recorder, and recording the conversation for unknown reasons. The doctor-patient relationship ended immediately, and claimant was transferred to Dr. Melhorn for continuing treatment, with July 21, 1997, being the last time Dr. Morris saw claimant for this injury. During the treatment of the right shoulder, claimant did not comment to Dr. Morris about any increase in his left upper extremity symptoms. Dr. Morris was asked, on cross-examination, whether it would be common for a person, whose right arm is in a sling for a month, to develop symptoms in his left upper extremity because of the immobilization of the right arm. Dr. Morris responded that it would not be common for such an occurrence. He opined he had not seen anyone, after shoulder surgery and being in a sling for a month, develop carpal tunnel syndrome in the opposite extremity.

After his disagreement with Dr. Morris, claimant's treatment was transferred back to Dr. Melhorn, who saw him on August 18, 1997. Dr. Melhorn diagnosed post-rotator cuff repair and noted a history of left carpal tunnel syndrome. Claimant also suffered from numbness and tingling of the left ring and little fingers, a condition not common to carpal tunnel syndrome, but usually indicating irritation of the nerve at the elbow on the left side.

Claimant underwent additional testing, including repeat nerve conduction studies and grip strength testing, which indicated claimant's condition in the left upper extremity had significantly improved since 1992. The grip strength on claimant's left side in 1992 was 11, 20 and 19 kilograms. On September 16, 1997, his grip strength on the left was

32, 31 and 33 kilograms. On October 15, 1997, his grip strength on the left was 24, 24 and 30 kilograms. Dr. Melhorn opined that claimant's left carpal tunnel condition had improved, and assessed claimant a 5.3 percent impairment to the left forearm at that time, based upon the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), and the Fourth Edition.

He also assessed claimant a 21.85 percent impairment to the right shoulder for the rotator cuff and impingement conditions.

Claimant was examined, at his attorney's request, by Dr. Pedro A. Murati, board certified in physical medical and rehabilitation. Dr. Murati saw claimant on January 7, 1998, assessing claimant an 11 percent impairment to the right upper extremity for the shoulder problems and a 10 percent impairment to the right upper extremity for the distal clavicle excision, a 13 percent impairment to the left upper extremity, and an additional 2.5 percent to each upper extremity for motor deficits in the median innervation. In using the combined values chart, he found claimant to have suffered a 16 percent whole person impairment as a result of the bilateral upper extremity conditions based upon the AMA Guides, Fourth Edition. Dr. Murati diagnosed carpal tunnel syndrome bilaterally.

On cross-examination, Dr. Murati was forced to admit that, based upon nerve conduction studies, there was an improvement from 1992 to 1997 on the left side. There also had been an indication in 1992 that claimant had cubital tunnel syndrome on the left side, but not in 1997. On physical examination, most of claimant's physical findings were negative. Claimant had negative carpal compression tests bilaterally, negative reverse Phalen's bilaterally, no wrist instability, no crepitus, and negative Tinel's signs at both wrists and both elbows. Only the LeBan's test was positive bilaterally. He admitted a good way to assess nerve impingement was through nerve conduction studies, which here indicated claimant's condition had improved on the left side. Dr. Murati acknowledged that he diagnosed right carpal tunnel syndrome without benefit of nerve conduction studies and with the majority of the tests performed on claimant being normal.

CONCLUSIONS OF LAW

DOCKET No. 225,494

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish the claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1992 Supp. 44-501 and K.S.A. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The medical opinion of Dr. Melhorn is the most credible regarding claimant's September 18, 1992, injury to his left upper extremity. Dr. Melhorn had the opportunity to examine and treat claimant over a substantial period of time after both injuries, and could compare claimant's condition in 1992 with his condition in 1997. The Appeals Board finds, based upon the evidence presented, that claimant has suffered an 11.95 percent impairment to the left upper extremity as a result of the 1992 injury.

The Administrative Law Judge granted claimant benefits for his outstanding medical only, finding claimant to be in violation of K.S.A. 1992 Supp. 44-501(c), as interpreted by Boucher, supra, in that claimant was not disabled for a period of at least one week from earning full wages at the work in which the claimant was employed.

However, it is uncontradicted that when claimant returned to employment after suffering the September 1992 injury, he did so at light duty. Claimant testified that, after the 1992 injury, he has remained on light duty for a substantial period of time, never actually returning to regular work without restrictions. In addition, the letter of Dr. Melhorn to Dr. Olsen dated December 21, 1992, states that claimant was returned to a "restricted work environment." The Appeals Board continues to hold that, when a claimant is on light duty, he is disabled from doing the job he was doing at the time of his injury. See Fuentes v. IBP, Inc., Docket No. 196,242 (October 1998). The Board has also held that the Boucher rationale does not apply where a claimant's injuries eliminated his ability to perform the type of work he was performing when the injuries occurred, even though claimant returned to work at a comparable wage. Chavez v. IBP, Inc., Docket No. 204,408 (January 1999).

In this instance, it is uncontradicted claimant returned to work at less than full duty, based upon the limitations of both Dr. Olsen and Dr. Melhorn. The Appeals Board finds that K.S.A. 1992 Supp. 44-501(c), as interpreted by Boucher, supra, has been satisfied in this instance, and claimant is entitled to his functional impairment of 11.95 percent.

AWARD

DOCKET No. 225,494

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark is hereby modified, and that an award is granted in favor of claimant, Bill F. Gillum, and against the respondent, Texaco Refining & Marketing, Inc., and its insurance carrier, CIGNA Workers Compensation, for an accidental injury sustained on September 18, 1992, and based upon an average weekly wage of \$805, for an 11.95 percent impairment to the left upper extremity at the forearm.

Claimant is entitled to 23.9 weeks of permanent partial disability compensation at the maximum rate of \$299 per week in the amount of \$7,146.10, all of which is due and owing at the time of this Award and ordered paid in one lump sum minus any amounts previously paid.

Claimant is entitled to his outstanding authorized medical and unauthorized medical up to the statutory limit.

Future medical will be considered upon proper application to and approval by the Director.

CONCLUSIONS OF LAW

DOCKET No. 223,962

Claimant alleges accidental injury beginning February 6, 1997, and continuing each and every day through the end of his employment. Claimant alleges that, not only did he suffer injury to his right upper extremity, but also that he aggravated the injury to his left upper extremity. The Appeals Board, however, finds that, based upon the medical opinion of Dr. J. Mark Melhorn, claimant's injury and award should be limited to his right upper extremity. Dr. Melhorn had the opportunity to examine claimant both in 1992 and again in 1997, and compare claimant's symptoms after both injuries. Dr. Melhorn opined that claimant's left upper extremity condition, rather than worsening, actually improved. Nerve conduction studies showed claimant's carpal tunnel condition had improved between the first and second injuries. The Appeals Board, therefore, finds claimant's award should be limited to compensation for the injury to his right upper extremity. Dr. Melhorn rated claimant at 21.85 percent impairment to his right shoulder. As the physician with the most contact with claimant and the most opportunity to assess claimant's ongoing limitations, the Appeals Board finds Dr. Melhorn's opinion to be the most credible evidence in the record. Claimant is, therefore, awarded a 21.85 percent impairment to the right upper extremity at the shoulder. While the Appeals Board notes the opinion of Dr. Murati, it finds the opinion of Dr. Melhorn to be the more realistic, based upon all of the evidence in the record.

AWARD**DOCKET No. 223,962**

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated July 21, 1998, in Docket No. 223,962 should be, and is hereby, affirmed, and an award is granted in favor of claimant, Bill F. Gillum, and against the respondent, Texaco Refining & Marketing, Inc., and its insurance carrier, CIGNA Workers Compensation, for an injury suffered on February 6, 1997, and based upon an average weekly wage of \$805, for a 21.85 percent impairment to claimant's right shoulder.

Claimant is entitled to 1.29 weeks of temporary total disability compensation at the rate of \$338 per week totaling \$436.02, followed by 48.88 weeks of permanent partial disability compensation at the rate of \$338 per week in the amount of \$16,521.44, for a 21.85 percent permanent partial impairment to the right shoulder, making a total award of \$16,957.46, all of which is due and owing at the time of this Award and ordered paid in one lump sum minus any amounts previously paid.

Claimant is further entitled to all of his outstanding medical, and unauthorized medical up to the statutory limit, upon presentation of an itemized statement verifying same.

Future medical will be considered upon proper application to and approval by the Director.

DOCKET Nos. 223,962 & 225,494

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

Court Reporting Service	
Discovery deposition of Bill F. Gillum	\$297.85
Deposition of James Molski	\$117.95
Deposition of J. Mark Melhorn, M.D.	\$224.00
Deposition of Harry A. Morris, M.D.	\$143.00
Deposition of George L. Lucas, M.D.	\$172.20
Deposition of Barbara Gomez	\$120.00
 Ireland Court Reporting	
Transcript of regular hearing	\$151.03

Alexander Reporting Co.

Deposition of Karen Crist Terrill

\$159.80

Deposition of Pedro A. Murati, M.D.

\$282.90

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Vincent A. Burnett, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director